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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1986

GARY R. FRINK and SHERRY R. FRINK,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JAMES M. GEORGE
and MARGARET C. GEORGE, et al.
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

JOINT APPENDIX OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

JOINT APPENDIX
VOLUME I

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2226

Gary R. Frink,
Sherry R. Frink, Appellees,
versus
Commissioner of Internal Revenue,
Appellant.

No. 85-2227

Gary R. Frink,
Sherry R. Frink, Appellees,
versus
Commissioner of Internal Revenue,
Appellant.

No. 85-2228

Gary R. Frink,
Sherry R. Frink, Appellants,
versus
Commissioner of Internal Revenue,
Appellee.

Appeals from the United States Tax Court. Jules G. Korner, III, Tax Court Judge. (Tax Court Nos. 12544-80; 17023-81)

Argued: June 4, 1986

Decided: August 8, 1986

Before PHILLIPS and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Teresa McLaughlin, Tax Division, United States Department of Justice (Roger M. Olsen, Acting Assistant Attorney General; Michael L. Paup; Ann Belanger Durney on brief) for Appellant/cross-appellee; F. Kelleher Riess (F. Kelleher Riess Corporation on brief) for Appellees/cross-appellants.

BUTZNER, Senior Circuit Judge:

The Commissioner appeals the Tax Court's judgment that a real estate partnership could deduct the losses of

Argo Hotels, Inc., in 1975, 1976, and 1977, because Argo was the nontaxable agent of the partnership. The taxpayers, who were investors in the partnership, appeal the court's judgment allocating 11% of the enterprise's losses to Coastal Golf, Inc.[1] The taxpayers contend that some of these losses were incurred by Argo. Because the taxpayers failed to establish that Argo's relationship with the partnership was not dependent on the partnership's control of Argo, we reverse the court's judgment that Argo was the nontaxable agent of the partnership. See National Carbide Corp. v. Commissioner, 336 U.S. 422, 437 (1949); Ourisman v. Commissioner, 760 F.2d 541, 547-48 (4th Cir. 1985). We affirm the court's judgment allocating 11% of the enterprise's losses to Coastal Golf because this allocation was reasonably based on the

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1. The taxpayers were partners in commendam. La. Civ. Code Ann. arts. 2839-2851 (West 1952). In all material respects they were limited partners. See Tatum v. Acadian Production Corp., 35 F. Supp. 40, 46 (E.D. La. 1940).

evidence introduced at the trial. Furthermore, the court did not abuse its discretion in denying the taxpayers' motion to reopen the case for the presentation of additional evidence concerning the allocation of losses.

I

The facts are set forth in the Tax Court's opinion and may be summarized here. See Frink v. Commissioner, 1984 T.C.M. (P-H) PP. 84,669, at 2713-22. In 1972, John C. Yemelos formed a real estate partnership for the purpose of developing a hotel in Biloxi, Mississippi. Yemelos later formed an enlarged partnership as new investors, including the taxpayers, joined the venture. At all times, Yemelos's interest in the partnership exceeded 50%, and he was one of two general partners.

Mississippi usury laws limited the amount of interest that could be charged noncorporate borrowers. Because this restriction did not apply to corporate borrowers, an attorney for the lender suggested that Yemelos transfer title to the hotel site of C. M. Conduit, Inc., which the attorney owned. Conduit would

hold legal title for the benefit of the partnership and borrow money for the project in return for a $1,000 fee. Yemelos agreed to this arrangement, but the lender objected, in part because of the word "Conduit" in the corporation's name. The parties agreed instead to transfer title to Argo. Yemelos and his wife each owned 50% of Argo and guaranteed its indebtedness. All of the parties to the loan transaction understood that Argo held legal title for the partnership, which was the real owner of the property.

On August 1, 1975, Yemelos and his wife also formed Coastal Golf, which was used to purchase a golf course as part of the hotel project. Unlike Argo, Coastal Golf was not needed to circumvent Mississippi's usury laws. Instead, Yemelos created the corporation in order to limit his personal liability while enabling the lender to carry the full amount of Coastal Golf's promissory note on its financial statements.

Both Argo and Coastal Golf entered into nominee agreements with the partnership. Argo's agreement provided

that it would act only for the account of the partnership, the partnership would indemnify it for any loss or liability, and it would hold title solely as nominee for the equitable, legal and beneficial ownership of the partnership. Coastal Golf's agreement provided in similar terms that it held title to the golf course as nominee of the partnership. Neither corporation served anyone besides the partnership. In 1976 Coastal Golf transferred title to the golf course to Argo, and in 1977 Argo transferred title to the hotel and golf course to the partnership. The nominee agreements did not provide for compensation to Argo or Coastal Golf, but in 1980 the partnership paid each corporation $100 for its services. Each reported this income on its tax returns. The Tax Court found that both Argo and Coastal Golf were viable, active corporations that performed extensive business activities during the taxable years in question.

The partnership claimed losses for the construction and operation of the hotel project on its returns for 1975,

1976, and 1977. The taxpayers deducted their distributive share of these losses. The Commissioner determined that the losses were attributable to Argo and Coastal Golf and disallowed the deductions.

The Tax Court held that Argo was the partnership's nontaxable, corporate agent. Therefore, the partnership could deduct Argo's losses. The court also held that Coastal Golf was not the partnership's agent because it acted in its own name and for its own account. Therefore, its losses could not be deducted. The court allocated 11% of the losses to Coastal Golf because the cost of acquiring the golf course was 11% of the total acquisition and construction costs of the project. After the court issued its decision, the taxpayers moved to reopen the case in order to show that Coastal Golf's losses were less than 11% of the project's losses. The court denied this motion.

II

In National Carbide Corp. v. Commissioner, 336 U.S. 422, 437 (1949), the Court ruled that a corporation may act

as the nontaxable agent of its shareholders. The Court stated:

> Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

National Carbide recognized an exception to the general rule, set forth in Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943), that corporations are

separate taxable entities.

In Ourisman v. Commissioner, 760 F.2d 541 (4th Cir. 1985), we considered whether a corporation formed to circumvent state usury laws qualified as the nontaxable agent of a real estate partnership.[2] Reversing the Tax Court, we held that the fifth National Carbide factor -- that the corporation's "relations with its principal must not be dependent upon the fact that it is owned by the principal" -- was a prerequisite to agency status. 760 F.2d at 547-48; accord Roccaforte v. Commissioner, 708 F.2d 986, 989-90 (5th Cir. 1983). The principles explained in Ourisman govern this case.

III

The Tax Court's judgment was largely premised on the fact that there was not a complete identity of ownership in Argo and the partnership. The court noted that Yemelos had a majority inter-

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2. The Tax Court in Ourisman held that the corporation was a nontaxable agent. Ourisman v. Commissioner, 82 T.C. 171 (1984), rev'd, 760 F.2d 541 (4th Cir. 1985). Ourisman was pending on appeal when this case was decided.

est in the partnership but only had a 50% stake in Argo. Yemelos's wife owned the rest of Argo's stock, but she was not an investor in the partnership. The court ruled that this disparity of ownership interests distinguished this case from Roccaforte in which the investors in the partnership owned the nominee corporation in exact proportion to their partnership interests. The taxpayers argue that Ourisman is also distinguishable because in that case, as in Roccaforte, there was a complete identity of ownership in the corporation and the partnership. The taxpayers contend that Raphan v. United States, 759 F.2d 879 (Fed. Cir. 1985), and Moncrief v. United States, 730 F.2d 276 (5th Cir. 1984), support the court's ruling.

The taxpayers' reliance on Moncrief is misplaced because the owner of the agent, unlike Yemelos, had less than a 50% interest in the partnership. Raphan is also distinguishable. In that case, although the owner of the agent had a 50% stake in the partnership, the trial court found that there was a sharing of control in the partnership such that no

partner had a controlling interest. By contrast, Yemelos always had a majority interest in the partnership. Moreover, there was no showing that Yemelos was unable to control Argo because he only had a 50% stake in the company. Accordingly, we hold that the disparity of ownership interests in Argo and the partnership does not distinguish this case from Ourisman and Roccaforte.

The Tax Court also noted that Yemelos initially agreed to use Conduit as the nominee corporation. Yemelos turned to Argo only after the lender objected to the use of Conduit. None of the investors in the partnership owned stock in Conduit. The taxpayers contend that Yemelos's willingness to use a nominee over which the partnership had no control establishes that the relationship between the partnership and Argo was conducted at arm's length.

Conduit would have charged the partnership a $1,000 fee, but the agreement with Argo did not require the payment of compensation. Ourisman holds that one of the factors to be considered in determining whether an arm's length

relationship exists is whether "the agent has entered into a written agency contract . . . providing for a reasonable fee for the agent's services." 760 F.2d at 548. It is inconceivable that Argo would freely agree to perform services without any promise of compensation. Argo was paid $100 in March 1980, but the partnership was not required to make this payment, and it came almost three years after Argo conveyed the hotel to the partnership. Cf. Jones v. Commissioner, 640 F.2d 745, 753-54 (5th Cir. 1981) (fifth National Carbide factor is not satisfied when the amount and timing of compensation is speculative). Therefore, we hold that Yemelos's attempt to utilize Conduit does not establish that the partnership entered into an arm's length agreement with Argo. We also reject the taxpayers' argument that Yemelos's fiduciary obligations as a director of Argo ensured that Argo's relationship with the partnership was conducted at arm's length. The facts simply do not support this theory.

The taxpayers argue that the use of Argo to circumvent Mississippi's usury laws was "a meaningless exercise that should be devoid of tax consequences." They note that the partnership retained equitable title to the property and was responsible for deciding how to operate the hotel project. Therefore, the taxpayers contend, "[t]he doctrine of substance over form demands recognition of the partnership as principal of its corporate nominee."

We cannot accept the taxpayers' argument. The substance of this transaction matches its form because, as the Commissioner emphasizes, Argo's ability to borrow money was premised on its status as a principal rather than as the agent of a non-corporate borrower. The loan papers do not disclose that Argo was acting for any one other than itself.[3]

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3. The taxpayers assert that Rev. Rul. 31, 1975-1 C.B. 10, and Rev. Rul. 26, 1976-1 C.B. 10, authorized "the use of a nominee corporation owned by the general partner to secure loans [to] its principal partnership as a device to avoid the requirements of New York law." We disagree. These corporations were created, not to avoid the requirements of New York law, but

The evidence establishes that Argo's relationship with the partnership was dependent on Yemelos's 50% ownership of Argo, his majority interest in the partnership, and his position as a general partner. Yemelos created the relationship. Acting for the partnership, he conveyed the hotel site to Argo, defined Argo's function, and guaranteed its debts. In 1977, he terminated the relationship by causing Argo to transfer improved real estate to the partnership for nominal consideration. Applying the test prescribed by National Carbide to these undisputed facts, we

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rather to comply with New York law in order to obtain funding from state agencies for public housing projects. In return for this funding, the state agencies were authorized to assume control of the corporations from the partnerships if the partnerships failed to develop the housing projects in accordance with state law. Thus, the activities of the corporations were largely regulated by the state. The Service ruled that the relationship between the partnerships and the corporations was not dependent on the partnerships' control of the corporations in light of the state's ability to assume control of the corporations. These rulings are not applicable to the present case because no entity is authorized to divest the partnership of its control of Argo.

reverse the Tax Court's judgment. See National Carbide, 336 U.S. at 437; Ourisman, 760 F.2d at 547-48.

IV

The taxpayers appeal the Tax Court's judgment allocating 11% of the project's losses to Coastal Golf. The taxpayers did not present evidence during the trial concerning the proper allocation of operating losses between Coastal Golf and Argo. Therefore, the court apportioned these losses on the basis of the only available evidence, which was the golf course's share of the project's capital costs. The court subsequently denied the taxpayers' motion to reopen the case for the presentation of evidence concerning the allocation of operating losses.

The taxpayers contend that the golf course's share of the project's operating losses was less than its 11% share of the project's capital costs. They assert that the court's decision is clearly erroneous and that the court abused its discretion in denying their motion to present additional evidence. The taxpayers rely on Stivers v. Commis-

sioner, 360 F.2d 35 (6th Cir. 1966), in which the Tax Court was required to receive additional evidence because the taxpayers were justified in their erroneous belief that failure to introduce the evidence would not affect the Tax Court's decision.

The taxpayers' reliance on Stivers is misplaced because it was foreseeable that the court would treat Coastal Golf and Argo differently in light of Yemelos's different reasons for using the two corporations. Therefore, the taxpayers were not justified in failing to present evidence concerning the proper allocation of losses between the two corporations.

The Tax Court did not err in allocating 11% of the project's operating losses to Coastal Golf. The taxpayers bore the burden of establishing the proper allocation. See Welch v. Helvering, 290 U.S. 111, 115 (1933). However, they did not offer any evidence during the trial. In these circumstances, the court was entitled to make a reasonable approximation on the basis of the evidence available to it. Cohan v. Com-

missioner, 39 F.2d 540, 543-44 (2d Cir. 1930). Furthermore, the court did not abuse its discretion in refusing to reopen the case to hear additional evidence because the "inexactitude [was] of [the taxpayers'] own making." Cohan, 39 F.2d at 544.

IV

The Tax Court's judgment allocating 11% of the project's losses to Coastal Golf is affirmed. The Court's judgment that the taxpayers can deduct part of Argo's losses is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-2226
NO. 85-2227
NO. 85-2228

Gary R. Frink, et al,

Appellees,

versus

Commissioner of Internal Revenue,

Appellant.

[Filed Sept. 16, 1986]

O R D E R

The appellees/cross appellants' petition for rehearing and suggesion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Phillips and Judge Chapman.

For the Court,

[Signed] John M. Greacen

CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 85-4786
OPINION

JAMES M. GEORGE and MARGARET C. GEORGE, HOLLIS O. GRAHAM and IDA G. GRAHAM, GEORGE A. WOLCOTT and DOROTHY WOLCOTT, TUNCAY ERTAN and NONA G. ERTAN, ESTATE OF COMAN S. NORTON, Deceased, CAROLINE NORTON, Testamentary Executrix, ROLAND M. TOUPS and KATHRYN B. TOUPS, DAVID R. CARPENTER and ERICA J. CARPENTER, CHARLES A. PRINCE and RUTH O. PRINCE, HARRY R. LAYNE and JANET J. LAYNE, STEPHEN G. ABSHIRE and MARY B. ABSHIRE, JANET F. BAUM, Formerly JANET F. NORTON, KENNETH G. FINK, JR. and CAROL FINK, DONALD L. McCOLLISTER and SANDRA M. McCOLLISTER, - ROBERT A. RAYFORD and IRIS B. RAYFORD, FREM F. BOUSTANY, SR. and BEATRICE J. BOUSTANY, FREM F. BOUSTANY, JR. and ANGELL F. BOUSTANY, SIDNEY FREDERICK and IRENE S. FREDERICK, ROLAND M. TOUPS and KATHRYN B. TOUPS.

Petitioners-Appellees-
Cross-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant-
Cross-Appellee.

Filed October 24, 1986

Before: Homer Thornberry, Sam D. Johnson, and Jerre S. Williams, Circuit Judges.

Opinion by Judge Homer Thornberry
Appeals from the Decisions of the
United States Tax Court

SUMMARY

Taxation

Appeals from Tax Court decisions allowing in part limited partners' distributive shares of losses from the development of a hotel. Reversed in part and remanded.

John C. Yemelos formed a partnership named Casren to develop a hotel. Yemelos owned 80 percent of the partnership and his mother-in-law owned the remaining 20 percent. In order to cir-

cumvent Mississippi usury law, a 1973 construction loan was structured through a corporation named Argo, which was owned equally by Yemelos and his wife. All of the loan papers described Argo as the owner of the hotel site. In 1975, Yemelos formed Coastal Golf, Inc. (CG) to purchase a golf course in connection with the hotel project. Yemelos and his wife were the sole shareholders of CG. In 1975, Yemelos also converted Casren into the Biloxi Hotel Properties Partnership (BHPP), a limited partnership under Louisiana law. BHPP executed "nominee agreements" with both Argo and CG, which provided that those corporations held only record title to the hotel and golf course and that BHPP was the legal, equitable and beneficial owner. The hotel site and the golf course was conveyed to BHPP in 1977. Three years later, Argo received $100 in return for its services as agent. BHPP reported losses from the hotel project in its returns for 1975 through 1977. As limited partners of BHPP, taxpayers deducted their distributive share of those losses on their individual

returns. The Commissioner of Internal Revenue disallowed those deductions after determining that the losses were properly attributable to Argo and not to BHPP. The Tax Court disagreed in part, finding that Argo acted solely as the corporate agent of BHPP with respect to the hotel, but that CG and Argo did not act as agents with respect to the golf course. The Tax Court proceeded to allocate 11 percent of the total losses to the golf course. [1] Accepting that Argo acted as agent for BHPP in developing the hotel, the issue presented is whether that agency relationship depended on Yemelos's ownership of BHPP and Argo because [2] when the relationship between a putative agent and its principal depends on the principal's ownership of the agent, the tax law will not accept the putative agency relationship. [3] Here, the Tax Court found that the divergence of ownership between BHPP and Argo satisfied the independence requirement. However, Yemelos controlled both BHPP and Argo. At all times, Yemelos owned a majority interest in BHPP and he and his wife each owned

50 percent of Argo. [4] On these facts, the taxpayers must prove that the relationship between Argo and BHPP did not depend on their common ownership. [5] In other words, taxpayers must prove that Yemelos and BHPP dealt with Argo at arm's length. [6] However, Yemelos made no provision for compensating Argo in the nominee agreements, and Yemelos paid Argo no compensation during the period Argo actually held title to the assets. It is inconceivable that Argo would have freely agreed to perform services without any promise of compensation. [7] Although taxpayers argue that Argo's relationship with BHPP had to be independent of Yemelos's ownership because Yemelos as general partner owed the limited partners in BHPP a fiduciary duty, any fiduciary duty in favor of the limited partners would limit the compensation that Yemelos could pay Argo in return for agency services. Here, BHPP paid Argo too little, not too much. [8] Because neither Argo nor CG satisfies the independent agency test for the hotel or the golf course, the Tax Court's allocation of loss between

the hotel and golf course need not be considered -- BHPP can deduct losses for neither.

OPINION

HOMER THORNBERRY, Circuit Judge:

Taxpayers were limited partners in the Biloxi Hotel Properties Partnership ("BHPP") and claimed their distributive share of losses from the development of the Biloxi Hilton Hotel. That project included both a hotel and a golf course. The Commissioner disallowed those losses because two corporations, Argo Hotels, Inc. ("Argo") and Coastal Golf, Inc. ("CG"), owned the project during the pertinent period. The Tax Court disagreed with the Commissioner in part: it found that Argo acted as agent for BHPP with respect to the hotel, but that neither Argo nor CG acted as an agent with respect to the golf course. The Tax Court proceeded to allocate 11 percent of the total losses to the golf course. The Commissioner appeals the Tax Court's decision that Argo acted solely as agent for BHPP. The taxpayers cross-appeal the Tax Court's allocation

of the loss. We reverse the Tax Court's decision on the question whether Argo acted as an agent. We dismiss the cross-appeals as moot.

Facts

The Tax Court opinion thoroughly describes the transactions at issue. Frink v. Commissioner, 49 T.C.M. (CCH) 386 (1984).[1] We summarize the pertinent facts here. John C. Yemelos formed a partnership named Casren to develop the Biloxi Hilton Hotel. Yemelos owned 80 percent of the partnership and his mother-in-law, Phopho Cosmas, owned the remaining 20 percent. To build the hotel, Yemelos wished to borrow $6.7 million from Mortgage Investors of Washington ("MIW"). Had MIW loaned that money directly to the partnership Casren, the interest rate would have been

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1.

The Tax Court decision covered twenty consolidated docket numbers. Taxpayers in 18 of those 20 docket numbers properly appealed to this court. Taxpayers in the remaining two docket numbers appealed to the United States Court of Appeals for the Fourth Circuit. Frink v. Commissioner, 798 F.2d 106 (4th Cir. 1986).

usurious under Mississippi law. To circumvent the Mississippi usury law, Yemelos and MIW structured the transaction through a corporation. MIW's counsel originally suggested a corporation that he owned named Conduit. Conduit would have charged a fee of $1000. MIW rejected that proposal. The parties then agreed to use a corporation named Argo, of which Yemelos and his wife each owned 50 percent. To that end Yemelos conveyed the land for the hotel to Argo. Yemelos and Argo agreed that:

> (1) Argo would act as Yemelos' agent in securing the MIW loan on his behalf; (2) Yemelos would indemnify Argo against all claims arising under the agreement; (3) Yemelos would fund all disbursements incident to the loan; (4) Yemelos would personally guarantee the loan; and (5) Argo would 'transact no business whatsoever for its own account as long as record title to this property and construction project remain in its name.'

Frink, 49 T.C.M. at 390. In 1973 Argo

borrowed the $6.7 million from MIW. In return, Argo executed notes and deeds of trust in favor of MIW. Yemelos and his wife personally guaranteed the entire $6.7 million loan to Argo.

All of these instruments described Argo as the owner of the hotel site. Yemelos and his wife submitted affidavits that Argo was the owner of the hotel site. "It was [MIW's counsel's] understanding, however, that the term 'owner,' as used in this context, related to legal ownership and not to equitable or beneficial ownership of the property." Id. at 391. In addition, "it was similarly the understanding of ... the president of MIW ... that Yemelos was the real borrower with whom MIW was dealing, and that the construction loan was being made to a 'nominee' corporate entity solely because of Mississippi usury laws." Id.

In 1975 Yemelos formed CG to purchase a golf course in connection with the hotel project. Yemelos and his wife were the sole shareholders of CG. CG purchased the Edgewater Golf Course from Bankers Trust Savings and Loan Associa-

tion ("Bankers Trust"). Yemelos used CG not to circumvent Mississippi usury laws but to limit his personal liability. In accordance with his desire to limit his personal liability on the golf course note, Yemelos personally guaranteed repayment of only $100,000.

In 1975 Yemelos also converted Casren into BHPP, a partnership in commendam (a limited partnership under Louisiana law). Yemelos and Cosmas were general partners, and they initially owned 68.9 percent and 5.3 percent interests respectively. Subsequent additions to the partnership reduced Yemelos's interest to 53.94 percent. BHPP executed "nominee agreements" with both Argo and CG, which provided that those corporations held only record title to the hotel and golf course and that BHPP was the legal, equitable and beneficial owner. Neither agreement was publicly recorded.

The Tax Court found:

> At all times here pertinent, Argo was a viable and active corporation which performed business activities in-

> cluding holding title to real estate, executing mortgages and deeds of trust, negotiating loans, entering into contracts, including a nominee agreement with BHPP, acquiring personal property, subjecting itself to third-party claims during construction, receiving income, incurring expenses, and filing Federal and state income tax returns.

Id. at 394. In 1976 CG transferred the golf course to Argo. In 1977, Argo conveyed the hotel site and the golf course to BHPP. Three years later, in 1980, Argo received $100 in return for its services as agent.

BHPP reported losses totalling over $4 million from the construction and operation of the Biloxi Hilton Hotel project on its returns for 1975 through 1977. As limited partners in BHPP, appellees deducted their distributive share of those losses on their individual returns. The Commissioner disallowed those deductions after determining that the losses were properly at-

tributable to Argo and not to BHPP. The Tax Court disagreed with the Commissioner in part and found as a matter of fact that "Argo served solely as the corporate agent of Casren and/or BHPP with respect to the development of the hotel site." Id. It agreed with the Commissioner that "CG and Argo acted in their own name and for their own account, and not as corporate agents, with respect to their ownership and operation of the golf course." Id.

Appeal

The Commissioner appeals the Tax Court's ultimate finding that "Argo served solely as the corporate agent of Casren and/or BHPP with respect to the development of the hotel site." Id. Because we agree with the Commissioner that the Tax Court's finding is clearly erroneous, we reverse the Tax Court's decision on this point.[2] The fourth

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2. The Tax Court's finding on Argo's agency status is one of fact. See Moncrief v. United States, 730 F.2d 276, 282-83 (5th Cir. 1984); Raphan v. United States, 759 F.2d 879, 883 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985). We must affirm that finding unless it is clearly erroneous. See 26 U.S.C. Sec. 7482; Fed. R.

circuit reached the same conclusion. Frink v. Commissioner, 798 F.2d 106, 109-10 (4th Cir. 1986).

[1] The Commissioner argues forcefully that the Tax Court misapplied the "fifth factor" of the agency test set forth in National Carbide Corporation v. Commissioner, 336 U.S. 422, 437 (1949): "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case."[3]

Civ. P. 52(a). The fourth circuit in Frink does not mention the standard of review: "Applying the test prescribed by National Carbide to these undisputed facts, we reverse the Tax Court's judgment." Frink, 798 F.2d at 110. In Durisman v. Commissioner, the fourth circuit phrased its holding as follows: "The [Tax] [C]ourt made explicit factual findings that we conclude, as a matter of law, preclude an agency finding under the proscription in the fifth factor." 760 F.2d 541, 548 (4th Cir. 1985). We hold simply that the Tax Court's finding is clearly erroneous.

3.
The entire text reads as follows:

> What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. Whether the corporation operates in the name and for the account of the

Although not entirely satisfied that the Tax Court correctly applied the National Carbide test in other respects,[4] we con-

> principal, binds the principal, by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

National Carbide, 336 U.S. at 437.

4.

Of particular concern is the Tax Court's distinction between Argo and CG. BHPP executed the same nominee agreement with both corporations, and both corporations performed essentially the same services. In addition, "[a]s with Argo, neither the note nor Yemelos's partial guarantee described CG as an agent." Frink, 49 T.C.M. at 397. The Tax Court treated CG differently than Argo for two reasons. First, Yemelos's purpose in using CG was to limit his personal liability as opposed to circumventing the Mississippi usury laws. The objective relationship between BHPP and Argo or CG, not Yemelos's purpose in using the corporate form, should determine whether the corporation acted as an agent. Moreover, the Tax Court's analysis suggests that Yemelos was only liable on those

fine our decision to whether the Tax Court erred in determining that Argo's relationship with BHPP did not depend on

notes through his personal guaranties. In that case, neither corporation actually bound anyone but itself on those notes, and both MIW and Bankers Trust were in the same position with respect to the property and the corporate borrower -- MIW simply had an additional guaranty. If Argo was Yemelos and BHPP's agent, then it should have been able to bind them as primary obligors and the guaranties would have been superfluous. Second, the Tax Court reasoned that there was no evidence (like the testimony of MIW's counsel and president) that Bankers Trust regarded CG as merely a title holder for Yemelos. The Tax Court's reliance on MIW's subjective understanding of the transaction seems misplaced given that MIW required Yemelos and his wife to submit affidavits stating that Argo owned the hotel site.

Our concern with the Tax Court's finding that Argo acted as BHPP's agent is "bottomed upon [our] inability ... to accept the proposition that [Argo] was not the substantive law owner of the assets." Miller, The Nominee Conundrum: The Live Dummy is Dead, but the Dead Dummy Should Live, 34 Tax L. Rev. 213, 254 (1979).

> It seems quite clear that any doubts should be resolved against taxpayers who have failed to make crystal clear the nature of the corporation's ownership. Moreover, the court would be fully justified in refusing to act upon the basis of documents kept hidden in files until produced for the purpose of resisting the tax collector.

Id. at 267 n. 134 (citation omitted).

Yemelos's ownership of Argo. In other words, we accept for the purposes of this opinion that Argo acted as agent for BHPP and not in its own name in developing the hotel site. This opinion addresses the question whether that agency relationship depended on Yemelos's ownership of BHPP and Argo.

[2] Initially, we reaffirm our conclusion in Roccaforte v. Commissioner that the independence requirement is mandatory. 708 F.2d 986, 989-90 (5th Cir. 1983). The Supreme Court's language in National Carbide allows no other result. Accord Frink, 798 F.2d at 109; Ourisman v. Commissioner, 760 F.2d 541, 547-48 (4th Cir. 1985). When the relationship between a putative agent and its principal depends on the principal's ownership of the agent, the tax law will not accept the putative agency relationship.

[3] Taxpayers may satisfy the independence requirement by showing either that the principal did not own the agent or that the agency relationship did not

depend on such ownership. Taxpayers argue in their brief that "not only were the limited partners not owners of Argo, but Argo was only fifty (50%) percent owned by one of two general partners." The Tax Court agreed that the divergence in ownership between BHPP and Argo satisfies the independence requirement. See Frink 49 T.C.M. at 398. We disagree. "[C]ommon control may legally exist in either of two ways[:] the principal can own a controlling interest in the agent or the same parties may own or control both principal and agent...." Raphan v. United States, 759 F.2d 879, 883 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985). We conclude that Yemelos controlled both BHPP and Argo. At all times Yemelos owned a majority interest in BHPP. In addition, he owned 50 percent of Argo and his wife owned the other 50 percent. The facts indicate that Yemelos controlled Argo, and the taxpayers do not dispute that. For example, Argo performed without promise of compensation substantial services for which Conduit would have charged $1000.

[4] In Raphan, the court upheld the Claims Court's finding that a corporation wholly owned by one of two equal partners was the agent for the partnership. Id. at 883-84. There, however, the court rejected the government's assertion that one of the two equal partners totally dominated the other, finding instead that the two partners intended to share control. The Tax Court made no such finding in this case. Indeed, such a finding is implausible. The taxpayers also cite Moncrief v. Commissioner, 730 F.2d 276 (5th Cir. 1984). In that case the sole owner of the corporate agent had only a 25 percent interest in the principal. In this case, however, Yemelos owned a majority interest in the principal and shared control of the agent with his wife. On these facts, we hold that the taxpayers must prove that the relationship between Argo and BHPP did not depend on their common ownership.[5]

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5. Even before Roccaforte, commentators recognized that it was safer to use an unrelated corporate agent. See, e.g., B. Bittker & J. Eustice, Federal Income Taxations of Corpora-

[5] "'[T]he significant criteria, as we understand them, are whether the so-called "agent" would have made the agreement if the so-called "principals" were not its owners, and conversely whether the "principals" would have undertaken the arrangement if the "agent" were not their corporate creature.'" Roccaforte, 708 F.2d at 990 (quoting Harrison Property Management Co. v. United States, 475 F.2d 623, 627 (Ct.Cl. 1973), cert. denied, 414 U.S. 1130 (1974)). In other words, taxpayers must prove that Yemelos and BHPP dealt with Argo at arm's length. See Ourisman, 760 F.2d at 548.

[6] Yemelos made no provision for compensating Argo in the nominee agreements. Yemelos paid Argo no compensation during the period that Argo actually held title to the assets. Argo

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tions and Shareholders PP. 2-10 at 2-29 (4th ed. 1979) ("These uncertainties, coupled with the hostile attitude of courts in recent years to claims that a corporation is the agent or nominee of its shareholders, suggest that cautious taxpayers may be well advised to use unrelated third-party entities for nominee functions.").

finally received $100 in 1980, three years after it had transferred all of the assets to BHPP. "It is inconceivable that Argo would freely agree to perform services without any promise of compensation." Frink, 798 F.2d at 110; see also Roccaforte, 708 F.2d at 990 n.4; Jones v. Commissioner, 640 F.2d 745, 753-54 (5th Cir.), cert. denied, 454 U.S. 965 (1981); Roccaforte v. Commissioner, 77 T.C. 263, 287 (1981), rev'd, 708 F.2d 986 (1983). Moreover, Argo acted as an agent for no one other than Yemelos and BHPP. See Roccaforte, 708 F.2d at 990 n.4; Ourisman, 760 F.2d at 548.

Taxpayers argue that Yemelos's willingness to use Conduit, a corporation in which he owned no stock, demonstrates the independence of Argo's relationship with BHPP. MIW rejected that arrangement "at least in part because it did not approve of the word 'conduit' in the corporate name."[6]

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6. MIW's aversion to the name Conduit may indicate that it wanted Argo and not Yemelos, Casren, or BHPP to be the actual owner of the land. That MIW required affidavits from Yemelos and

Frink, 49 T.C.M. at 390. Yemelos may have been willing to use an unrelated corporate agent, but he did not do so. That Conduit would have charged $1000 for the same services that Argo performed without any promise of compensation buttresses our conclusion that Yemelos did not deal at arm's length with Argo.

[7] Taxpayers also argue that Argo's relationship with BHPP had to be independent of Yemelos's ownership because Yemelos as general partner owed the limited partners in BHPP a fiduciary duty. Any fiduciary obligation in favor of the limited partners would limit the compensation that Yemelos could pay Argo in return for agency services. Here, BHPP paid Argo too little, not too much. We therefore reject taxpayers' argument that Yemelos's fiduciary duty demonstrates that he bargained at arm's length with Argo for agency services.[7]

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his wife stating that Argo was the "owner" as opposed to the holder of mere legal title supports that view. Those observations, however, relate to the findings of an agency relationship in the first place and not to the independence of that relationship.

Conclusion

[8] The Tax Court found that "the relationship of Argo ... to Casren and BHPP was not dependent upon the ownership and control of the former ... by the latter two entities." Frink, 49 T.C.M. at 398. That finding is clearly erroneous. Accordingly, we reverse the Tax Court's decision to the extent that it treats Argo as the agent for BHPP. The Tax Court allocated the loss between the hotel and the golf course only after it determined that Argo acted as an agent for the hotel, but that neither Argo nor CG acted as an agent for the golf course. Because we hold that neither Argo nor CG satisfies the agency test of National Carbide for the hotel or the golf course, we need not consider the Tax Court's allocation of loss between the hotel and the golf course -- BHPP can deduct losses for neither.[8]

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7. We distinguish Rev. Rul. 75-31, 1975-1 C.B. 10, and Rev. Rul. 76-26, 1976-1 C.B. 10, for the reasons stated in Frink, 798 F.2d at 110 n.3.

8. The taxpayers argue in their brief that they presented no evidence on the proper allocation of the total loss because they "were wholly

Accordingly, we dismiss the cross-appeals as moot. We remand the case for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

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unaware that the Court would arrive at different conclusions regarding Argo and Coastal Golf."

Appeals from the Decision of the
United States Tax Court

Before THORNBERRY, JOHNSON,
and WILLIAMS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the petition of the Commissioner of Internal Revenue for review of orders of the United States Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the United States Tax Court in this cause is reversed, and the cause is remanded to the Tax Court for further proceedings in accordance with the opinion of this Court. IT IS FURTHER ORDERED that the cross-appeals in this cause are dismissed as moot.

IT IS FURTHER ORDERED that petitioner-appellees cross-appellants pay to respondent-appellant cross-appellee the costs on appeal, to be taxed by the Clerk of this Court.

October 24, 1986

ISSUED AS MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4786

JAMES M. GEORGE, ET AL.,
Petitioners-Appellees
Cross Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellant
Cross-Appellee.

[Filed Dec. 2, 1986]

Petition for Review of an Order of the
United States Tax Court

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10-24-86, 5 Cir., 198__, _____ F.2d _____)

(December 2, 1986)

Before THORNBERRY, JOHNSON and WILLIAMS,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam D. Johnson

United States Circuit Judge REHG-6

11-26-87 [sic]

APPENDIX E

Recommended for Full Text Publication
See Sixth Circuit Rule 24

NO. 85-1825
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the
United States Tax Court

JESSE C. BOLLINGER, JR.; EDWARD H. PETER, JR. and MARY H. PETER; PAUL W. HENSLEY and MARY N. HENSLEY; JESSE C. BOLLINGER, JR. and SUZ-ANNE BOLLINGER; JESSE C. BOLLINGER, JR. and JACQUELINE BOLLINGER; JESSE C. BOLLINGER, JR. and SUZ-ANNE C. BOLLINGER,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

Decided and Filed December 2, 1986

Before: ENGEL and NORRIS, Circuit Judges; and COHN, District Judge.*

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*The Honorable Avern Cohn, United States District Judge, Eastern District of Michigan, sitting by designation.

ALLEN E. NORRIS, Circuit Judge. Respondent, Commissioner of Internal Revenue, appeals from orders of the United States Tax Court allowing to petitioners income tax deductions for losses generated by the construction and operation of apartment complexes.

Because the Tax Court made extensive findings of fact, the recitation of facts which follows is a summary of those findings.

Petitioner, Jesse C. Bollinger, was a real estate developer who, both individually and in partnership with other petitioners, developed a number of apartment complexes in Kentucky. In order to obtain construction financing, financial institutions required that the nominal debtor be a corporate nominee of the sole proprietorship or partnership seeking the financing. Accordingly, record title to the various properties was held by a corporation as a device to

comply with Kentucky law, which provided that lending money to a non-corporate borrower at the market rate of interest prevailing at the time in question was usurious.[1]

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1. The Tax Court developed a chart showing the apartment complexes constructed, the entities constructing them, the interest of the individuals in the various constructing entities, and the corporate nominee holding title:

		Individual's Interest in the Partnership						
Apartment Complex	Partnership	Bollinger	Peter	Hensley	George Martin	Samuel Zell	Robert Laurie	Title
1. Creekside North*	*	100%						Creekside Inc (1)
2. Carriage Hill	Carriage Hill	66-2/3%		33-1/3%				Creekside Inc
3. Creekside South	Creekside South	50%	50%					Creekside Inc
4. Les Chateaux	Les Chateaux	33-1/3%	33-1/3%	33-1/3%				Creekside Inc (Sold Sept 1971)
5. Lamp-lighter	Lamp-lighter	33-1/3%	33-1/3%	33-1/3%				Creekside Inc
6. Two Lakes	Two Lakes:							
	7/16/71-9/10/74	50%				50%		Creekside Inc
	9/10/74-2/6/75	2%				98%		Howard Walker Trustee
	After 2/6/75	0				100%		Howard Walker Trustee
7. Ski Lodge*	*	100%						Creekside Inc (Sold 1975)
8. Colister	Cloister							Cloisters Inc
	7/15/73-1/4/74	50%			50%			(Until 12/31/74) (2)
	1/4/74-11/5/75	9-1/2%			9-1/2%	81%		Greenland VistaInc (3)
	After 11/5/75	0			0		19%	(After 12/31/74)

*Sole proprietorship
(1) Creekside, Inc., a Kentucky corp. wholly owned by Bollinger.
(2) Cloisters, Inc., a Kentucky corp. wholly owned equally by Bollinger and Martin.
(3) Greenland Vistas, Inc., a Delaware corp. in which petitioners had no interest.

The circumstances surrounding Bollinger's development of Creekside North Apartments are typical of those related to the other developments. When he sought a construction loan and permanent financing for the project, he was advised by financial institutions that, in view of Kentucky usury laws, they would require that Bollinger's corporate nominee be the debtor and record titleholder. He obtained a commitment for permanent financing from Massachusetts Mutual Life Insurance Company, in which the company agreed to make a loan to "the corporate nominee of Jesse C. Bollinger, Jr."; the loan was to be secured by a mortgage on the apartments and by a personal guaranty from Bollinger.

After consulting with his accountant and attorney, Bollinger incorporated Creekside, Inc., for the sole purpose of having a corporate nominee for securing financing for the development of his apartment projects. He was the corporation's sole shareholder. Bollinger and Creekside, Inc., entered into an agreement which generally provided that the corporation would hold title to

Creekside North Apartments, as Bollinger's agent, only for the purpose of securing temporary and permanent financing of the project.

To finance construction of the apartments, Bollinger, through Creekside, Inc., borrowed the funds from Citizens Fidelity Bank and Trust Company. The corporation executed all the loan documents, and then transferred the loan proceeds to Bollinger's individual construction account.

Bollinger acted as general contractor during the construction of Creekside North Apartments, and costs of construction were paid from his construction account. Upon completion, Bollinger, through Creekside, Inc., obtained permanent financing from Massachusetts Mutual Life, with the loan being secured by a mortgage upon the apartments and a partial personal guaranty by Bollinger. The loan proceeds were used to pay off the construction loan from Citizens Fidelity.

The Tax Court also found that Bollinger intended to retain all but record title to the apartment complex; that he

intended that the corporation would convey record title to him as soon as feasible; that no tax-avoidance scheme was present; and that, by incorporating Creekside, Inc., Bollinger sought none of the traditional insulating benefits of a corporate shareholder. Bollinger employed a resident manager to rent the apartments, execute leases, collect rents, and maintain operating records.

Operation of Creekside North Apartments generated losses in 1969, 1971, 1972, 1973, and 1974, and ordinary income in 1970, 1975, 1976, and 1977. Both the income and losses were reported by Bollinger on his individual income tax returns.

Pursuant to a substantially identical pattern, petitioners secured financing for the construction of the other apartment complexes through the use of a corporate nominee. Each partnership actively managed its apartment complex and reported income and losses on its partnership tax returns. Petitioners, in turn, reported their distributive shares of the partnership income and losses on their individual returns.

Creekside, Inc., acted as corporate nominee for six of these projects, and Cloisters, Inc. (which was owned equally by Bollinger and another investor), as nominee for the seventh project. The lenders regarded Bollinger or the respective partnerships as the owners of the apartments, required partial personal guaranties from them, and looked to them for repayment. Creekside, Inc., and Cloisters, Inc., had no liabilities, assets, employees or bank accounts, nor did they manage the apartment complexes.

The Commissioner disallowed the loss deductions claimed by Bollinger and the other partners, taking the position that the losses were those of the corporation which held title to the real estate.

In siding with the petitioners, the Tax Court held that they had clearly established that the corporations were acting as agents, and the losses were therefore attributable to the sole proprietorships or partnerships.

The manifest purpose of the income tax is to tax income to those persons or entities that earn or otherwise create

the right to receive income and enjoy its benefit when paid. Helvering v. Horst, 311 U.S. 112, 119 (1940); 26 U.S.C. Secs. 1 and 11. Normally, the tax consequences of business transactions involving real property will fall upon its owner, since that is who customarily conducts the business and has the right to collect and enjoy the income. However, it does not follow that a nominal owner will be taxable, where there is transferred to him, as agent, the bare legal title, with the equitable owner retaining for himself the real and beneficial ownership.

The difficulty, in situations where the purported principal-equitable owner has an ownership interest in the corporation which holds nominal title, lies in determining whether there is a true agency relationship between the two, or whether there is such a kinship and similitude between the two, that the purpose of the income tax would be thwarted if an agency relationship were to be recognized. See, e.g., Moline Properties, Inc. v. Comm'r of Internal Revenue, 319 U.S. 436 (1943).

The Supreme Court, in National Carbide Corp. v. Comm'r of Internal Revenue, 336 U.S. 422 (1949), enunciated principles which are instructive in the resolution of this appeal. That case involved an arrangement, formalized by contract, where a parent corporation utilized its wholly owned subsidiaries as operating companies to manufacture and sell goods. Under the contract, the parent provided working capital, executive management, and office facilities to the subsidiaries, termed "agents," which, in turn, paid substantially all the profits from their manufacturing and sales operations to the parent. The Commissioner took the position that all the income turned over to the parent was taxable to the subsidiaries.

The Supreme Court sided with the Commissioner, disregarded the agency agreement, and noted that, under the circumstances of that case, the parent and subsidiaries operated with such oneness of purpose that the enterprise could as well have been conducted by a single corporate entity. 336 U.S. at 436. Because the agency contract added

nothing to the relationship which existed in fact, it could be disregarded so that the tax consequences might follow the reality of the circumstances.

However, the Supreme Court pointed out that this conclusion did not foreclose under all circumstances a "true corporate agent . . . from handling the property and income of its owner-principal without being taxable therefor." 336 U.S. at 437. Where generally recognized attributes of an agency relationship are present,[2] a controlled corporation can still be a true agent if its relations with its principal are not dependent upon the fact that it is owned by its principal, and its business purpose is the carrying on of the normal duties of an agent. Id. In other words, inquiry must be made

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2. The Supreme Court listed these attributes:
> Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists.

336 U.S. at 437.

whether the agent would have made the agreement if the principal were not its owner and, conversely, whether the principal would have undertaken the relationship if the agent were not its corporate creature. See Harrison Property Management Co., Inc. v. United States, 475 F.2d 623 (Ct. Cl. 1973), cert. denied, 414 U.S. 1130 (1974).

Because one would not expect an independent agent to perform all the work and then turn over the profits to its principal, in exchange for only nominal compensation, it is readily apparent that the purported agency relationship in National Carbide could not have existed in the absence of ownership and control of the subsidiary.

By contrast, holding nominal title is the kind of task customarily undertaken by independent agents. Thus, it cannot be said that the agency relationship in this case was dependent upon the fact of common ownership and control, in the sense that in the absence of common ownership and control an agent would not assume the duty of holding nominal title, and a principal would not entrust

that duty to an agent. A corporation unrelated to the principals could just as well have been entrusted to hold nominal title to avoid usury problems, while the principals retained the real and beneficial functions of property ownership.

The Tax Court observed that petitioners desired to operate their business either as sole proprietorships or partnerships, and were thwarted in completely doing so only by the practical requirement that they form corporations in order to comply with state usury laws. They did not attempt to avail themselves of the normal benefits of doing business in the corporate form; indeed, they conducted the businesses in individual and partnership capacities, remaining subject to the claims of creditors and others. Nor did they use the corporations as part of a tax-avoidance scheme. This is not, therefore, a situation where a taxpayer has embraced the advantages of doing business as a corporation and, so, in fairness, must be held to the burdens as well as the benefits of the corporate

form.

Accordingly, the Tax Court did not err in finding that the attributes of a true agency relationship were present under the circumstances presented by this case, and the decision of the Tax Court is consistent with the Supreme Court's opinion in National Carbide.

As one might expect, the factual situation before us is not unique; is has been the subject of review by other Courts of Appeals. In a case involving similar facts, Ourisman v. Comm'r of Internal Revenue, 760 F.2d 541 (4th Cir. 1985), the Fourth Circuit reversed a holding by the Tax Court that a corporate nominee was a true agent of the developer-partnership. In doing so, the court rejected the Tax Court's understanding that the requirement of National Carbide that relations between the agent and principal must not be dependent upon the fact that the agent is owned by the principal, is satisfied where the corporate nominee acted no differently than an independent agent would have acted if the agent had bargained with its principal for its serv-

ices at arm's length. Instead, the Fourth Circuit assigned a "literal" interpretation to that requirement, holding that the taxpayer's evidence must establish that the agency relationship was, in fact, an arm's length arrangement. This, in essence, is the position we are urged by the Commissioner to adopt. A similar result was reached in Roccaforte v. Comm'r of Internal Revenue, 708 F.2d 986 (5th Cir. 1983), although that case is easily distinguishable on its facts.[3]

The Fourth Circuit's reading of the Supreme Court's requirement is subject to the criticism that it exalts form over substance, when the facts of that

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3. The Commissioner also relies upon an opinion of the Court of Appeals for the Federal Circuit as supporting its position [Vaughn v. United States, 740 F.2d 941 (Fed. Cir. 1984)], but that case is also readily distinguishable upon its facts since, unlike the instant case, the activities of the purported corporate agent were inconsistent with a claim of agency. Moreover, in a later case, Raphan v. United States, 759 F.2d 879 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985), that same Court of Appeals affirmed a judgment of the Court of Claims which had held that a principal-agency relationship did exist, and approved a review by the trial court of the National Carbide factors which was strikingly similar to the review undertaken in this case by the Tax Court. See Raphan v. United States, 3 Cl. Ct. 457 (Cl. Ct. 1983), aff'd in part, rev'd in part, 759 F.2d 879 (Fed. Cir.), cert. denied, 106 S.Ct. 129 (1985).

case are viewed in the context of the court's own characterization of its holding:

> Such a result simply recognizes the fact that if the agency relationship could not exist but for the shareholders' ownership and control of the corporate agent, the alleged agency relationship is nothing more than a manifestation of the underlying corporation-shareholder relationship and that the corporation therefore must be regarded as a separate taxpaying entity under our system of separate taxation of corporations.

760 F.2d at 549.

In our view, when the evidence establishes that the attributes of an agency are present, and the corporate nominee conducts itself no differently than would an independent agent which had bargained with its principal for its services at arm's length, then, even under the Fourth Circuit's "but for" test, a true principal-agent relationship has

been proved. When the Supreme Court, in National Carbide, said that, under certain circumstances, a true corporate agent is not foreclosed from handling the property and income of its owner-principal without being taxable, it could not have contemplated so strict a reading of circumstances that, as a practical matter, the existence of a true agency would be foreclosed. What the Supreme Court demanded was an inquiry into the actual substance of the relationship to determine if an agency existed in fact. Here, by any realistic assessment, the corporations acted like agents. When one surveys the circumstances of this case, one is hard-pressed to divine the harm which must be guarded against by adopting the Commissioner's position. Accordingly, we decline to follow the Fourth Circuit's view, as expressed in Ourisman.

The orders of the Tax Court are affirmed.